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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

GENARO SALAS BLANCO, JR.,

Defendant and Appellant.

B214420

(Los Angeles County  
Super. Ct. No. NA074081)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Richard R. Romero, Judge. Affirmed as modified.

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Patricia Ihara, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found Genaro Salas Blanco, Jr., guilty of second degree murder (Pen. Code, § 187, subd. (a)) and assault on a child under eight years of age causing death (Pen. Code, § 273ab). On appeal Blanco contends the trial court erred in refusing his request to instruct the jury on involuntary manslaughter (Pen. Code, § 192, subd. (b)) and miscalculated his custody and conduct credits. We conclude that the evidence did not warrant an instruction on involuntary manslaughter.

### **FACTS AND PROCEEDINGS BELOW**

At the time of his death, two-year-old Anthony R. lived with his mother, Gabriela A. (Mother), his brothers Brian, age four, and David, age six months, his Mother's boyfriend, Genaro Blanco, and Blanco's five-year-old son, S.S.

On the morning of April 16, Blanco woke Mother and told her something that caused her to go into the children's bedroom. There, she saw Anthony lying on his back. His body was cold and his eyes did not look "normal." He did not respond when she called his name loudly several times. Mother told Blanco to call 911, which he did. Paramedics arrived in less than five minutes but were unable to revive Anthony. They transported him to a nearby hospital where he died from "multiple traumatic injuries."

The prosecution and the defense offered different versions of how Anthony received the blows that took his life.

Officer Ignacio Zavala testified that he arrived while the paramedics were still trying to revive Anthony. When he entered the apartment he smelled urine and soiled diapers. He asked, "Who pooped in the living room?" Blanco's son, S.S., responded: "Anthony went pee-pee in the bed. And my daddy got mad and punched Anthony in the back and choked him, and my daddy slammed him in the refrigerator door." "I didn't

want my daddy to choke me and slam me in the refrigerator door so I laid in the bed, too, because I was scared.”<sup>1</sup>

Later that morning Sergeant Charlotte Alu also interviewed Blanco’s son, S.S., at the apartment. Alu testified that S.S. told her “Anthony had woken up and had peed himself and that his dad had . . . socked Anthony and choked Anthony.” S.S. used his hands to demonstrate a choking movement and a closed fist to show how Blanco had punched Anthony. Alu further testified that S.S. “pointed to the refrigerator door and said his father had banged Anthony’s head against the refrigerator door.” A photograph was admitted into evidence showing “a splatter mark [with] fluid dripping down the front of the refrigerator door.” S.S. told Alu that the round splatter mark was where Blanco bashed Anthony’s head against the door.

The police arrested Blanco and interviewed him twice at police headquarters. The interviews were introduced into evidence.

In the first interview Blanco stated that when he found out that Anthony had wet himself, he took him into the bathroom and put him in the bathtub to clean him up. Anthony tried to escape from the tub and slipped and hit his head. Blanco then took Anthony to the couch in the living room where he urinated again. Blanco spanked Anthony on the bottom with an open hand and when he did so, Anthony fell and hit the front part of his mouth on the linoleum floor causing his mouth to bleed “a little bit.” After cleaning off Anthony’s mouth Blanco made him go stand facing the refrigerator for a few minutes as punishment. Blanco then gave Anthony and the other children cereal for breakfast and went to his bedroom. Approximately 10 minutes later, Blanco’s son, S.S., came into the bedroom and told Blanco, “Anthony’s not playing with us.” Blanco got up to see what was wrong. Anthony was lying on his back with a “funny look” so he called Mother who told him to call 911.

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<sup>1</sup> At trial, S.S. denied that he told the police that Blanco choked and punched Anthony and slammed his head into the refrigerator.

In the second interview Blanco stated that he “socked” Anthony “a couple of times” before putting him in the bathtub. Blanco further stated that while Anthony was in the bathtub he started to slip and Blanco grabbed him with both hands around his neck to keep him from falling. After the bath Blanco took Anthony into the living room where he started “playing” with him and S.S. by hitting them with his fists. He told the police, “When I socked [him] upside the head, he did lose his breath a little bit.” Blanco admitted he punched Anthony five or six times that morning.

Blanco testified in his own defense. He denied smashing Anthony’s head into the refrigerator or intentionally doing anything else to seriously injure the child. He stated he did not give Anthony a spanking after he urinated the second time but merely gave him “a barely little pat” which caused him to slip because he was still wet from his bath. Blanco admitted socking and kicking Anthony but claimed it was just “playing.” He acknowledged that when they were wrestling he punched Anthony hard enough to knock the wind out of him but not hard enough to cause him to pass out.

There was no dispute as to the cause of Anthony’s death.

Dr. David Whiteman, a county medical examiner, testified to the results of the autopsy he performed on Anthony. The autopsy showed that Anthony was approximately 3 feet tall and weighed 27 pounds. He had approximately 50 fresh bruises from his head to his genitals. He had fresh injuries to his lower torso that were consistent with hard punches to the abdomen. His liver was torn into three pieces from a forceful upward blow to his abdomen. There was tissue damage to the left of his liver around his spleen and hemorrhaging around his pancreas and stomach. The ligament that held Anthony’s stomach in place was torn and the tissue that held his intestines in place was bruised. Anthony also had bruises and internal bleeding around his kidneys. The muscles in the back of Anthony’s rib cage, behind his abdominal organs, were bruised and a pool of blood had accumulated in his abdomen showing that the tears to his organs occurred when his heart was still beating.

In addition to the organ and tissue damage, two bones in Anthony's spine were slightly separated and his spinal cord was bruised. He also had a large bruise on the back of his head, three hemorrhages on the right side of his head, and hemorrhages on the top of his head. A bruise had formed on the surface of his brain caused by his brain hitting his skull. These bruises occurred within "a few hours of the death of the child." Anthony had six fresh bruises on his jaw and upper neck. The neck bruises were consistent with Anthony having been choked. There were bruises on Anthony's arm, leg, thigh, buttocks and around his penis. Finally, there were injuries over Anthony's breast bone that were consistent with knuckle marks or with someone's hands encircling his chest and squeezing.

In the words of the medical examiner who performed the autopsy: Anthony "was beaten to death[.]"

The court instructed the jury on malice murder. It also instructed on assault causing the death of a child and the lesser included offenses of assault likely to produce great bodily injury, simple assault and child abuse likely to produce great bodily injury or death. The court denied Blanco's requested instruction on involuntary manslaughter finding "the facts do not support that [instruction.]"

The jury found Blanco guilty of malice murder and assault on a child causing death. The court sentenced Blanco to 50 years to life on the assault conviction (25 years to life doubled under the three strikes law) and 30 years to life on the murder conviction (15 years to life doubled under the three strikes law). The latter sentence was stayed under Penal Code section 654. The court awarded Blanco 659 days of custody credits and no conduct credits. Blanco filed a timely appeal.

## DISCUSSION

### I. BLANCO’S ENTITLEMENT TO AN INSTRUCTION ON INVOLUNTARY MANSLAUGHTER

The trial court must instruct the jury sua sponte “on all theories of a lesser included offense which find substantial support in the evidence.” (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) Involuntary manslaughter is a lesser included offense of murder. (*People v. Lewis* (2001) 25 Cal.4th 610, 645.) Nonetheless, “the existence of ‘any evidence, no matter how weak’ will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is ‘substantial enough to merit consideration’ by the jury. [Citations.] ‘Substantial evidence’ in this context is “‘evidence from which a jury composed of reasonable [persons] could . . . conclude[.]’” that the lesser offense, but not the greater, was committed. [Citations.]” (*People v. Breverman, supra*, 19 Cal.4th at p. 162.)

California law recognizes two theories of involuntary manslaughter. Penal Code section 192, subdivision (b),<sup>2</sup> provides that the killing of a human being without malice is involuntary manslaughter when it results from “the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.” At trial, Blanco requested an involuntary manslaughter instruction on the premise that Anthony’s death occurred in the commission of misdemeanor child abuse in violation of section 273a. On appeal, he argues the court should have instructed the jury under both theories. We disagree.<sup>3</sup>

<sup>2</sup> All statutory references are to the Penal Code.

<sup>3</sup> The record does not indicate that Blanco rejected the “lawful act” theory for tactical reasons, therefore we must consider his argument on appeal that there was sufficient evidence to require a sua sponte instruction on that theory. (*People v. Beames* (2007) 40 Cal.4th 907, 927.)

Under either theory there must be sufficient evidence to permit the jury to find that the defendant committed the acts that led to the victim's death without realizing the risk involved. (*People v. Evers* (1992) 10 Cal.App.4th 588, 596.) Thus, the jury is instructed under CALCRIM No. 580 that the determination whether the offense is murder or involuntary manslaughter "depends on whether the person was aware of the risk to life that his or her actions created and consciously disregarded that risk. An unlawful killing caused by a willful act done with full knowledge and awareness that the person is endangering the life of another, and done in conscious disregard of that risk, is voluntary manslaughter or murder. An unlawful killing resulting from a willful act committed without intent to kill and without conscious disregard of the risk to human life is involuntary manslaughter." Whether a person acted in conscious disregard of the risk his conduct posed to the life of another is measured objectively: if a reasonable person would have been aware of the risk, the defendant is presumed to have had that awareness. (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 136-137.) Given the severity of Anthony's injuries as described in the undisputed testimony of the medical examiner, "[t]he only possible inference the jury could draw from the evidence presented was that [Blanco] knew and understood the probable consequences of his action . . . ." (*People v. Evers, supra*, 10 Cal.App.4th at p. 597 [upholding trial court's refusal to instruct on involuntary manslaughter based on nature of child's beating].)

Dr. Whiteman, who specializes in child abuse cases, testified without contradiction that Anthony's injuries required a significant degree of force. He further stated that the injuries were consistent with child abuse and inconsistent with an accidental slip-and-fall or an ordinary spanking. The bruises on Anthony's abdomen, for example, were consistent with "a very hard slap" or a "hard punch." The bruises on his buttocks were made by a blow with "a lot of force"; enough to drive skin against bone through the "huge pad of fat underneath the buttock." This type of bruise, Whiteman testified, does not result from an ordinary spanking. The bruises around Anthony's neck were consistent with choking, not an accidental grabbing. One of the blows to Anthony's

head “was hard enough to cause the brain to hit the skull internally to form a bruise on the surface of the brain.”

No reasonable juror could have concluded that Blanco was guilty of the lesser offense of involuntary manslaughter. The evidence demonstrated that the injuries to Anthony could only have been produced by a degree of force that any reasonable person would have understood was likely to produce great bodily harm or death to a two-year-old.

## **II. BLANCO’S ENTITLEMENT TO PRESENTENCE CUSTODY CREDITS**

Blanco, whose 50 years to life sentence we have upheld, complains that the trial court shorted him two days of custody credits. The People agree. We will direct that the abstract of judgment be modified to show that credit.

## **III. BLANCO’S ENTITLEMENT TO PRESENTENCE CONDUCT CREDITS**

Finally, Blanco contends that the trial court improperly denied him presentence conduct credits under section 4019. He acknowledges that section 2933.2, subdivisions (a) and (c) deny presentence conduct credits to “any person who is convicted of murder,” but argues he is entitled to credits against his sentence for violation of section 273ab because the trial court stayed the sentence on his murder conviction. This issue is before our Supreme Court in *In re Pope*, review granted April 9, 2008, S160930, and *People v. Duff*, review granted August 29, 2007, S153917.

Blanco’s reasoning lacks merit. Section 2933.2, subdivision (a) states: “Notwithstanding Section 2933.1 or any other law, any person who is *convicted of murder*, as defined in Section 187, shall not accrue any credit, as specified in Section 2933.” (Italics added.) Subdivision (c) of the statute states: “Notwithstanding Section 4019 or any other provision of law, no credit pursuant to Section 4019 may be earned against a period of confinement in, or commitment to, a county jail, . . . following arrest for any person specified in subdivision (a) [i.e. a “person who is convicted of murder”].” Section 2933.2’s denial of conduct credits under section 4019 is not contingent on the



execution of a murder sentence. The statute unambiguously states subdivision (c) applies to “any person specified in subdivision (a),” that is, “any person who is *convicted* of murder.” (Italics added.)

### **DISPOSITION**

The judgment is modified to award defendant two additional days of custody credit and the cause is remanded to the trial court to prepare an amended abstract of judgment reflecting the modification and to forward a copy to the Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.